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No. 09-1131

IN THE
Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINE WADE,

PETITIONERS,

V.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR CATO INSTITUTE, BECKET FUND FOR RELIGIOUS LIBERTY, AND NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI*[1]

The amici joining in this brief are not-for-profit organizations committed to protecting essential liberties of the American people. More detailed statements describing each amicus are set forth in an Appendix.

SUMMARY OF THE ARGUMENT

In *Tinker v. Des Moines Independent Community School District*, this Court made clear that students enjoy First Amendment rights, and that core political and religious speech cannot be suppressed absent a showing that the speech will "materially and substantially disrupt" the educational process. Over the ensuing forty years, the Court has repeatedly reaffirmed this central holding ensuring a respectful dialogue in the public schools on issues of public concern. Having excepted disruptive speech from the scope of First Amendment protection, *Tinker* and its progeny afford school administrators ample authority to assure the integrity of the learning environment—at all grade levels—while also balancing those needs with the speech rights of students. In contrast, the Fifth Circuit's approach, ostensibly applying the time,

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[1]The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the intention of Amici Curiae to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for amici certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than amici, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief.

place, and manner standard set forth in *United States v. O'Brien* for mixed conduct and speech, casts aside any pretense of balance and permits schools to enforce sweeping speech prohibitions by which all or virtually all student speech may be prohibited. Indeed, the school policy at issue in this case underscores the fact that even pure written speech—which embodies the very essence of the First Amendment—is included in this unnecessarily broad approach. Such speech is critical to the development of responsible discourse among our nation's youth.

ARGUMENT

I. THIS COURT'S PRECEDENT FULLY SERVES ALL LEGITIMATE INTERESTS OF SCHOOL ADMINISTRATORS IN RESTRICTING SPEECH, WHEREAS THE FIFTH CIRCUIT'S STANDARD INVITES INCREMENTAL ABOLITION OF STUDENTS' SPEECH RIGHTS.

A. *Tinker* And Its Progeny Already Provide School Administrators The Authority To Restrict All Speech That They Have A Legitimate And Constitutional Interest In Restricting.

While this Court has made it clear that students in public schools enjoy First Amendment rights, *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969), it has *also* recognized the unique needs of the education environment by affording school officials the authority to restrict any student speech that officials reasonably believe will "materially and substantially disrupt the work and discipline of the school," *id.* at 513, that is "lewd" or "vulgar," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S.

675, 685 (1986), or that may be reasonably viewed as advocating unlawful drug use, *Morse v. Frederick*, 551 U.S. 393, 410 (2007). The Court has also recognized that school officials have a heightened interest in regulating student speech whenever that speech carries the imprimatur of the school itself. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1998). Through these cases, the Court has established a workable framework that accounts for the needs of educators to maintain order in their classrooms, while also recognizing the unquestioned First Amendment rights that students carry with them into the schoolhouse. But none of these refinements of *Tinker* have threatened the basic rule that non-disruptive student speech on core First Amendment topics is protected.

Under the present framework, a school district such as Plano Independent School District ("PISD") could constitutionally impose a ban on all student speech that it considers to be "materially and substantially disruptive," as well as all speech that is "lewd" or "vulgar," or which advocates unlawful drug use, and it could carefully regulate school-sponsored speech. By process of elimination, all *remaining* speech would be constitutionally protected. In short, it would be the speech—including core religious and political speech—that the school lacks any legitimate interest in restricting.

The only conceivable objectives that a school district could advance by enacting a more comprehensive, content- and viewpoint-neutral ban affecting *all* student speech such as the policy enacted by PISD in this case would be (1) to insulate

school administrators from the effort and potential controversy of having to exercise judgment in determining what speech is disruptive, or (2) to enable school administrators to regulate a particular category of speech that they would be otherwise unable to constitutionally restrict. Both of these objectives violate *Tinker* and undermine the First Amendment.

1. An Interest In Avoiding Controversy And/Or Avoiding The Task Of Exercising Judgment Is Not A Legitimate Justification For The Suppression Of Protected Speech.

As this Court observed in *Tinker*, "an urgent wish to avoid the controversy which might result from the expression," cannot justify stripping public school students of their First Amendment rights. 393 U.S. at 509-10. Similarly, this Court has held that difficulties in drafting narrow rules do not justify the government adopting sweeping restrictions. *City of Houston v. Hill*, 482 U.S. 451, 465 (1987). An administrator's unwillingness to craft a constitutionally proper restriction on disruptive student speech—whether to save time or to avoid making unpopular decisions—thus does not justify the adoption of a blanket prohibition.

Administrators can no more avoid their obligation to respect the speech rights of those who are compelled into their care, than they might avoid the burden and awkwardness of having to conduct a hearing before or after imposing serious discipline (*e.g.*, *Ingraham v. Wright*, 430 U.S. 651 (1977)) or the

inconvenience of refraining from intrusive searches absent actual, reasonable suspicion of misconduct. (*e.g.*, *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009)). Convenience for those in positions of authority is not the defining objective of the Bill of Rights. While the educational setting is admittedly unique, it is not beyond the reach of the Constitution, as *Tinker* itself made plain.

2. Enacting A Sweeping Ban On All Written Speech Is Antithetical To The First Amendment.

According to the current Fifth Circuit precedent, the problem with the high school's policy in *Tinker* was that it did not go far enough. If the school administrators had simply banned *all* symbolic student speech, rather than singling out the arm bands, the policy would have been—under the Fifth Circuit's current standard—a permissible content- and viewpoint-neutral restriction. Such a conclusion produces an all-or-nothing scenario that encourages school administrators to simply outlaw *all* speech in order to get rid of the protected speech they disfavor—whether it is political speech, religious speech, or some other expression contrary to the whims of the principal, school board, or dominant preference of the community. If that had been the holding in *Tinker*, one can only imagine that it would have resulted in the widespread adoption of all-encompassing, but content- and viewpoint-neutral bans on student speech at schools nationwide during the volatile 1970s, resulting in the suppression of the speech of an entire generation.

The approach now favored by the Fifth Circuit and some other lower courts is far more than an exception to *Tinker*; it is a transformation. While some Circuits may have merely implied a basis for wide-ranging, albeit back-handed, censorship of student speech that expresses controversial ideas, *see, e.g., Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), the Fifth Circuit has gone even further and fully endorsed the wholesale suppression of an entire category of written speech.

The Fifth Circuit's proposed "exception" thus represents an altogether new rule under which even core political speech that poses no discernible threat of disruption can be completely and thoroughly driven off school grounds at the convenience of administrators, so long as it is grouped with all other student speech of the same category. This promotion of deliberate over-breadth is in direct conflict with this Court's precedent, strips away the basic rights previously guaranteed to students (so long as all students are denied those rights), and invites school administrators to use neutrality as a pretext to suppress disfavored political and religious speech.

The history of this litigation demonstrates how a school district, emboldened by the Fifth Circuit, can use a broad "content- and viewpoint-neutral" restriction as a pretext to censor disfavored religious speech. PISD's original student speech policy afforded school officials virtually unfettered discretion to suppress the distribution of written materials by students. App. to Pet. Cert. 95. And school officials specifically used that discretion to root out all remnants of student religious speech. Pet.

Cert. 5-8. When that policy was challenged, PISD shifted to yet another extreme, enacting an amended policy that purportedly bans the exchange of virtually all written materials. App. 98, 103.

The PISD's new policy was apparently "presented only as a litigating position" and serves to confirm both its intention to suppress controversial speech and its preference to evade critical scrutiny of that intention. *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 871 (2005). Given the scope of this new policy, it seems highly unlikely that even PISD believes that it is capable of being fully enforced. Any effort at partial enforcement is almost certain to be directed at the more controversial religious and political speech protected at the First Amendment's core. While *Tinker* would permit that and other speech to be constrained *to the extent it is disruptive,* no decision of this Court has endorsed the exclusion of religion or controversial, if nondisruptive, speech from the public schools. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384 (1993).

Indulging the notion that PISD actually intends to enforce its new policy does little to save it. The only meaningful difference between the PISD former and new policies is that it has now sacrificed its own discretion to permit speech that it favors—such as, perhaps, passing out Dallas Cowboys bumper stickers during football season—in the interest of what it evidently perceives to be the greater need to prohibit non-disruptive religious and other protected speech. This is directly contrary to the First Amendment. *See Hill v. Colorado*, 530 U.S. 703, 767 (2000) (Kennedy, J., dissenting) ("Clever

content-based restrictions are no less offensive than censoring on the basis of content."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 454 (1996) ("Officials may care so much about suppressing a particular idea affected by a content-neutral law as to disregard or tolerate the law's other consequences."); *see generally*, Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 Harv. C.R.-C.L. L. REV. 31 (2003).

While facially neutral, the amended policy in this case is merely a pretext that permits school officials to do precisely what they could not constitutionally do under the original policy: suppress otherwise protected speech. Put simply, school districts should not be permitted to use the guise of neutrality to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509.

3. Even In The Absence Of Pretext, Such A Broad But Facially Neutral Restriction On Student Speech Is Unconstitutional.

Even without the pretext discussed above, the broad bans sanctioned by the Fifth Circuit are unconstitutional. In effect, the Fifth Circuit's adoption of *O'Brien* over *Tinker* invites school administrators to solve problems with widespread carpet bombing instead of the pinpoint strikes mandated by *Tinker*. The collateral damage to the

core rights protected by the First Amendment is both excessive and avoidable.

The policies at issue in this case can be loosely analogized to the attempts of municipalities to completely ban entire mediums of expression. This Court has held ordinances invalid that completely banned the distribution of pamphlets within a municipality, *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938); handbills on public streets, *Jamison v. Texas*, 318 U.S. 413, 416 (1943); door-to-door distribution of literature, *Martin v. City of Struthers*, 319 U.S. 141, 145-49 (1943); *Schneider v. State*, 308 U.S. 147, 164-65 (1939); and live entertainment, *Schad v. Mount Ephraim*, 452 U.S. 61, 75-76 (1981). The mere fact that it is student speech that is being restricted does not transform the analysis.

Indeed, *Tinker* and its progeny closely parallel this Court's speech jurisprudence in the non-school context, where the right to engage in core political and religious speech has been fervently guarded. For example, outside of the context of schools, the First Amendment does not protect "fighting words," *Chaplinksy v. New Hampshire*, 315 U.S. 568 (1942); in the *school* context, the First Amendment does not protect disruptive speech. *Tinker*, 393 U.S. at 513. Similarly, the First Amendment does not protect obscene speech in the non-school context, *Miller v. California*, 413 U.S. 15 (1973), and in the school-context does not protect "lewd" and "vulgar" speech. *Fraser*, 478 U.S. at 685. Accordingly, just as a city could not suppress core speech through a broad, but "facially neutral" prohibition on any and all signs in *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), a school

district cannot suppress core speech in schools through a broad, but ostensibly "facially neutral" prohibition on written expression in this case. This is especially true when the existing authority granted to schools by this Court's student-speech jurisprudence undercuts any claim that sweeping, facially neutral restrictions on speech are a necessary means of furthering any legitimate goal of school officials.

Prohibiting civil speech and debate rights among our most impressionable and developing population segment is surely not what the Framers or the Court in *Tinker* had in mind. While the challenge in this case is directed at enforcement of a rule in elementary schools, that rule is equally applicable to all students in all grades. Thus, no student could be assured of his or her right to express views on *any* issue of public concern.

B. The "Material And Substantial Disruption" Exception To Tinker Is A Flexible Standard That Sufficiently Accommodates Disparities Between Students, Such As Age And Grade Level.

PISD's policy restricts the speech not only of elementary-aged children such as the Petitioners in this case—who, indeed, are themselves now several years older than they were when the events giving rise to this case first occurred—but applies to *all* grade levels. App. 98. PISD's *legitimate* interests—*i.e.*, preventing substantially and materially disruptive speech—are fully served under the existing *Tinker* standard with respect to *all* grades—

K through 12—because of the inherent flexibility of the "substantial disruption standard."

To be sure, even elementary-aged students enjoy constitutional speech rights just as they enjoy due process and Fourth Amendment protection. *See, e.g., Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993) (noting that "nothing in the First Amendment postpones the right of religious speech until high school"). Amici recognize, however, that what might fairly be considered "disruptive" speech will vary depending on the speaker and the audience. As this Court has explained, a student's right to express a point of view in a public school is as extensive as "the special characteristics of the school environment" permit. *Tinker*, 393 U.S. at 506; *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) ("the nature of [student] rights is what is appropriate for children in school"). The characteristics of a kindergarten classroom—in which young children's study may include topics such as colors and rhyming words—are substantially different from the characteristics of a high school classroom in which students are expected to be capable of discussing genocide in Darfur. What would be considered "disruptive" would certainly vary between those two environments. The protection of non-disruptive speech is, however, critical in a civil society.

Tinker's substantial and material disruption standard is sufficiently flexible to account for the differences in maturity between elementary school and older children, and, in any event, provides administrators the authority needed to assure the

educational integrity of the classroom at all grade levels. Accordingly, there is no need or justification for a wholesale abolition of speech—such as the standard now being applied by the Fifth Circuit—to accommodate the unique circumstances of a grade school rather than high school classroom.

C. Permitting A Wholesale Content- And Viewpoint-Neutral Ban On All Speech Or A Form Of Speech As An Alternative To The *Tinker* Standard Will Result In The Erosion And Eventual Elimination Of Student Speech In School At Great Cost To Societal Interests.

Under Fifth Circuit precedent, school administrators have two choices. They can expend the proper time and effort to craft prudently tailored policies to prohibit disruptive speech, but which do not enable administrators to restrict other types of "protected" speech that they find undesirable. Or they can simply enact a broad, blanket prohibition that shuts down all student speech. There is a strong basis for believing that—given those two choices—many school administrators will select the path of least resistance. And, often times, the protected speech driving the adoption of such policies will be religious or political insofar as that speech is typically the most controversial and, thus, the speech that administrators are most interested in censoring.

The unfortunate effect of such policies will be generations of Americans ill-prepared for meaningful social, religious, and political discourse. To the extent such sweeping bans are selectively enforced—singling out the less preferred speech—students and

parents alike will simply be left to brood or litigate the as-applied question, passing the issue to the courts, albeit in a different form.

1. Schools Will Use Broad, Facially Neutral Bans On Speech As A Pretext To Target Religious And Political Speech.

Religious and political speech are the most likely types of speech to be the *real* target of broad speech restrictions for the simple reason that it is the form of speech over which people most often disagree. It is that very disagreement that will motivate some students to speak out and others to complain. Rather than risk complaints from students, teachers, or citizens who disagree with some controversial student speech, the easy course in many districts will be to suppress all speech, thus eliminating all controversial speech, and thereby—administrators will hope—avoiding all controversy.

Many school administrators will seek to avoid religious speech out of fear of controversy and litigation. This is somewhat ironic, of course, given that religious speech "is at the core of the First Amendment." Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public High School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 123-24 (2008); *see Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.") (emphasis in original). This

Court has repeatedly held that non-disruptive private religious speech is protected in public schools. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (same issue at university level).

Despite this, "[s]chools have repeatedly claimed that the Establishment Clause requires or justifies them in censoring religious speech, on grounds derived from their own confused definition of their mission." *Laycock*, *supra*, at 124-25. "Because the Establishment Clause prohibits *schools* from promoting religion, some schools conclude that any *student* speech promoting religion is inherently inconsistent with the educational mission of the school." *Id.* at 125. Just as some school administrators resist this Court's decisions restricting school-sponsored prayer, and try to inject as much religion as they can into the school's own speech, other school administrators resist this Court's religious-free-speech decisions and seek to suppress all mention of religion lest they be accused of encouraging or promoting religious speech.

The Fifth Circuit's precedent, if left unchecked, arms such administrators with what they believe to be yet another means of avoiding Establishment Clause concerns. In actuality, it not only runs contrary to longstanding principles of free speech, but in fact subverts the many long-standing principles of religious exercise described above.

2. Broad Bans On Student Speech Will Have A Detrimental Societal Effect.

Just under 50 million Americans attend public K-12 schools.[2] Only a little more than half of those students will attend college, and many of those will not attend college for long. Thus, the majority of the civic training of the country's young adults, many of whom will vote and establish their own households shortly upon graduating, occurs in the public schools.

It is hardly surprising then that this Court has consistently recognized that public education is "the very foundation of good citizenship." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-68 (1982); *West Virginia State. Bd. of Educ. v. Barnette,* 319 U.S. 624, 637 (1943). Accordingly, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (*citing Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). This is because the "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the . . . class." *Fraser*, 478 U.S. at 683. Rather, teachers and administrators "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities," *Ambach v. Norwick*, 441 U.S. 68, 79 (1979), as well as "inculcate the habits and

[2] Maria Glod, *A Changing Student Body*, WASH. POST, June 1, 2009, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/31/AR2009053102229.html. (last visited 4/15/2010).

manners of civility." *Fraser*, 478 U.S. at 681. But when schools teach constitutional freedoms in theory yet fail to honor them in practice, they "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637.

That is precisely the effect of the broadly suppressive though purportedly neutral speech restrictions involved in this case. The Fifth Circuit and other Circuits that have endorsed neutrality as a sufficient justification to suppress student speech have taken a first step toward approving the transformation of schools into the totalitarian enclaves that this Court condemned in *Tinker*.

The lessons of citizenship can be neither taught nor learned in this type of oppressive environment. Instead of being taught to value civil speech and debate—including non-disruptive core political and religious speech—students are taught that student speech, which is neither lewd nor supportive of illegal drug use, may nonetheless be suppressed by the state on the most hollow of grounds.

II. THE DISTRIBUTION OF THE WRITTEN WORD LIES AT THE HEART OF THE FIRST AMENDMENT.

The *O'Brien* standard applied by the Fifth Circuit is a particularly poor fit for the student speech at issue in this case because *O'Brien* addressed conduct that was symbolic—not the pure speech engaged in by Petitioners. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968). Of course,

written expression—which is exactly what PISD's policy seeks to restrict—is at the very heart of the First Amendment, and such expression has long been critical to furthering society's most profound debates. Historically, written communications have been especially important for voices challenging authority and orthodoxy. Such controversial expression drove the Protestant Reformation, the American Revolution, and the ratification of the Constitution. Yet the Bible, the *Declaration of Independence*, *Common Sense*, and the *Federalist Papers* are all documents that could not be distributed among students in the Plano schools without fear of official discipline. Indeed, students complaining of PISD's policy could not even underline the First Amendment or a copy of *Tinker* and exchange it with a classmate, or circulate a petition to present to the principal. In fact, if the policy is to be evenly enforced, they will not be permitted to exchange birthday or holiday cards, candy hearts on Valentine's Day, or share clippings from the local newspaper.

The fact that such policies may be used, as in this case, as a pretext to suppress religious speech places the Fifth Circuit's ruling even further at odds with this Court's precedent. The distribution of religious literature is protected *both* as speech and as free religious exercise. In *Murdock v. Pennsylvania*, this Court noted that "hand distribution of religious tracts...has been a potent force in various religious movements down through the years...[and] occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits. It has the same claim to protection as the

more orthodox and conventional exercises of religion." 319 U.S. 105, 108-09 (1943).

By endorsing sweeping, deliberately overbroad restrictions on the distribution of written materials by its students, the Fifth Circuit has rejected *Tinker* and the lessons of history that gave rise to the First Amendment.

Amici urge the Court to grant certiorari and reverse.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted,

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APPENDIX

INTERESTS OF THE AMICI

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts—including in a variety of First Amendment cases, as well as in others involving student rights. Cato files the instant brief to address the need to clarify constitutional speech protections in the face of heavy-handed government regulations.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan, law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world. In particular, the Becket Fund has vigorously advocated for the right of religious individuals and institutions to express their beliefs freely and peacefully.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE

serves as the collective voice of evangelical churches and other religious ministries. That religious speech is often the first target of the censor goes at least as far back as John Milton's *Areopagitica* (1644). Its protection is imperative. NAE also believes that religious freedom is a gift from God that the government does not create but is charged to protect. NAE is grateful for the American constitutional tradition safeguarding religious freedom, and believes that jurisprudential heritage should be maintained in this case.